

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 21, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-243
Petitioner	:	A. C. No. 48-00992-03502 LLO
v.	:	
	:	Cordero Mine
L & T FABRICATION &	:	
CONSTRUCTION, INC.,	:	
Respondent	:	

DECISION

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David M. Arnolds, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against L & T Fabrication & Construction, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of \$40,000.00. A hearing was held in Gillette, Wyoming. For the reasons set forth below, I affirm the citation and assess a penalty of \$20,000.00.

Background

Production Industry Corporation (PICOR) entered into a contract to remove all of the old silo load-put facilities at the Cordero Mine, located in Campbell County, Wyoming, and to install a new batch weigh system. The Respondent, L & T Fabrication & Construction, Inc., contracted with PICOR to do the structural portion of the project. Edward Loren and Catherine C. Crain own 100 percent of the shares in L & T.

On the morning of August 6, 1997, L & T employees were working in silo number 2 at the mine installing a deck in the north half of the silo. The deck was approximately 18 and one half feet above the floor. After the deck plates had been placed and hot-tacked, Glen Belt, the foreman, decided to begin installing a handrail on the deck while the deck was being welded. Belt

carried a five foot long by four foot high section of the handrail up to the deck. The section weighed between 60 and 90 pounds. Shayne DeGaugh, who had worked for the company for three weeks, went to get bolts for the handrail.

Belt set the handrail over the barricade at the top of the stairs. As he was crossing the barricade himself, the piece of handrail slid on the deck and went over the edge. At the same time, DeGaugh was returning with the bolts, walking directly under the deck. The handrail hit DeGaugh in the head. As a result, his neck was broken and he is permanently paralyzed from the neck down.

After an MSHA investigation of the accident, Citation No. 7608502, alleging a violation of section 77.203, 30 C.F.R. ' 77.203, was issued.¹ The citation stated that: "Adequate protection was not provided in silo number 2 where people were working on an elevated walkway 18.5 feet above the concrete floor. A section of handrail measuring 5.5 feet long by 4 feet high fell and struck a person walking underneath the elevated platform." (Govt. Ex. 1.) The inspector found the violation to be "significant and substantial" and to have resulted from high negligence and an "unwarrantable failure" on the part of the operator.²

Findings of Fact and Conclusions of Law

¹ Section 77.203 provides: "Where overhead repairs are being made at surface installations and equipment or material is taken into such overhead work areas, adequate protection shall be provided for all persons working or passing below the overhead work areas in which such equipment or material is being used."

² The "significant and substantial" and "unwarrantable failure" language is taken from section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard" and which was "caused by an unwarrantable failure . . . to comply with . . . mandatory health or safety standards"

At the hearing, the parties stipulated that the violation occurred as alleged in the citation, that it was significant and substantial and resulted from high negligence and the operator's unwarrantable failure to comply with the regulation.³ (Tr. 12, 19, 25-26.) Accordingly, I affirm the citation.

Civil Penalty Assessment

³ The operator had been cited for the same violation on May 21, 1997. (Govt. Ex. 2.)

The only issue contested at the hearing was the amount of civil penalty to be assessed for this violation. The Secretary has proposed a penalty of \$40,000.00. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i).⁴ *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

The parties have stipulated that the operator demonstrated good faith in abating the violation, that L & T worked 32,933 man-hours on the mine site in 1997, and, as previously noted, that the violation was significant and substantial and occurred because of the operator's high negligence and unwarrantable failure to conform to the regulation. (Tr. 25-26.) The evidence further indicates that L & T had received only two citations in the two years preceding the violation in this case, those being the May 21, 1997, citation and the one at issue in this case, that the company had only been cited six times in its 18 year history, and that three of those were subsequently vacated. (Tr. 71, 79.)

To show that the proposed \$40,000.00 penalty will adversely affect its ability to continue in business, L & T has submitted its fiscal year 1996 and 1997 financial statements,⁵ its tax returns for 1995 and 1996 and a current, as of October 31, 1998, balance sheet and income statement. (Resp. Exs. B, C, D, E and F.) The financial statements are accompanied by an Independent Accountants Report on the Financial Statements stating:

We have reviewed the accompanying balance sheets of **L & T Fabrication & Construction, Inc.** as of November 30, 1997 and 1996, and the related statements of income, retained earnings and cash flows for the years then ended, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. All of the

⁴ The section 110(i) penalty criteria are: [T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

⁵ L & T's fiscal year ends on November 30 of the year being reported.

information included in these financial statements is the representation of the management of **L & T Fabrication & Construction, Inc.**

A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit conducted in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our reviews, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles.

(Resp. Ex. B.)

It is apparent from this letter that the financial statements are not reliable information on which to determine whether the civil penalty will adversely affect L & T's ability to remain in business. The statements are unaudited; everything in them is the representation of the company. There is no way to know whether that information is complete, true and correct. Indeed, the accountants specifically declined to express an opinion regarding the financial statements taken as a whole. The burden is on the operator to show that the penalty will adversely affect its ability to remain in business. *Sellersburg* at n.14. Unaudited financial statements are not sufficient to do so. *See Spurlock Mining Co, Inc.*, 16 FMSHRC 697, 700 (April 1994).

Furthermore, the submitted documents do not establish that L & T's ability to continue in business will be adversely affected if it has to pay the full \$40,000.00. The company's balance sheet indicates that the company's current assets increased from \$396,038.00 in 1996 to \$438,431.00 in 1997, while its current liabilities decreased from \$347,489.00 in 1996 to \$214,958.00 in 1997. (Resp. Ex. B.) More significantly, the most recent balance sheet, as of October 31, 1998, shows current assets had increased to \$549,327.05, with current liabilities of \$181,681.72. (Resp. Ex. E.) Thus, it appears that the company has the capacity to absorb the penalty and still remain in business, just as it absorbed a loss of \$85,000.00 on a project in 1996 and still remained in business. (Resp. Ex. B, n.9; Tr. 97.)

Although L & T has not shown that the proposed penalty will adversely affect its ability to remain in business, I do not agree with the penalty proposed by the Secretary. I find that the gravity of this violation was extremely serious. It resulted in a young man being permanently paralyzed from the neck down and could easily have been a fatality. The company was highly negligent in failing to barricade the area below the deck after having been cited for the same violation some three months before. Without more, these factors would justify the proposed

\$40,000.00 penalty. However, I find that the company's very good history of prior violations, its small size and the fact that it rapidly abated the violation mitigate the penalty. Accordingly, taking all of the penalty criteria into consideration, I conclude that a penalty of \$20,000.00 should be assessed.

Order

Citation No. 7608502 is **AFFIRMED**. L & T Fabrication & Construction, Inc., is **ORDERED TO PAY** a civil penalty of **\$20,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge
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